

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2020-136

AUGUST TERM, 2020

In re Frank Fellows*	}	APPEALED FROM:
	}	
	}	Superior Court, Orleans Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 181-7-19 Oscv

Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Petitioner appeals pro se from the dismissal of his petition for habeas corpus as prematurely filed. We affirm.

Petitioner was convicted of sexual assault and lewd and lascivious conduct with a child in 2010; the victim was his daughter. His direct appeal was unsuccessful. See State v. Fellows, 2013 VT 45, ¶ 1, 194 Vt. 77 (affirming convictions). His first petition for post-conviction relief (PCR) was denied following a four-day evidentiary hearing, a ruling we affirmed on appeal. See In re Frank Fellows, No. 2018-130, 2018 WL 4835000 (Vt. Sept. 28, 2018) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo18-130.pdf> [<https://perma.cc/WH6P-JLGG>]. Petitioner filed a second PCR petition, which the trial court dismissed in January 2020. We affirmed that decision in July 2020. See In re Frank Fellows, No. 2020-051, 2020 WL 4038994 (Vt. July 14, 2020) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo20-051.pdf> [<https://perma.cc/9YTD-PVCV>]. Both petitions were filed in Essex County, where petitioner’s sentences were imposed.

Meanwhile, in July 2019, petitioner filed the petition for habeas corpus at issue here, arguing that he was wrongfully convicted. He filed his petition in the Orleans Civil Division. The State moved to dismiss the petition or, alternatively, to transfer venue to the Essex Civil Division. The trial court dismissed the petition as premature given petitioner’s pending PCR. It denied the motion to transfer venue as without basis and futile given that there already was a pending PCR in the Essex Civil Division. The court explained that the primary mechanism for challenging the legality of a conviction was through the filing of a PCR in the county where sentence was imposed. See 13 V.S.A. § 7131. Pursuant to 13 V.S.A. § 7136, the court would not consider a habeas petition filed by a prisoner who could seek relief through a PCR unless it appeared that the PCR remedy was “inadequate or ineffective to test the legality of his or her detention.” The court found that there had been no showing of inadequacy of the PCR process in Essex County and it would be premature to make such a determination until the PCR process there was complete. The court thus found no current basis for a habeas corpus petition in the Orleans Civil Division and it granted the State’s motion to dismiss. This appeal followed.

Petitioner appears to suggest that the court was biased against him. He contends that he should have been allowed to pursue his habeas petition notwithstanding his pending PCR. He suggests that the court made inconsistent rulings with respect to the State’s motion to transfer venue. Petitioner also addresses the merits of

his petition and questions why the court did not address one of the issues that he raised with respect to the enhancement of his sentence. He further contends that he was denied his right to counsel.

We find no error. First, petitioner’s suggestion of bias is wholly unsupported by the record. See Ball v. Melsur Corp., 161 Vt. 35, 45 (1993) (stating that “bias or prejudice must be clearly established by the record,” and “that contrary rulings alone, no matter how numerous or erroneous, do not suffice to show prejudice or bias”), abrogated on other grounds by Demag v. Better Power Equip., Inc., 2014 VT 78, 197 Vt. 176.

We similarly reject petitioner’s assertion that the court misinterpreted 13 V.S.A. § 7136. As the trial court found, the habeas petition was prematurely filed because, at the time of the court’s decision, there had been no final decision on petitioner’s second PCR. Thus, the court could not evaluate if the PCR remedy was “inadequate or ineffective to test the legality of his . . . detention,” a threshold requirement under 13 V.S.A. § 7136. Petitioner offers no persuasive argument to the contrary. The right to petition for habeas corpus has not been abrogated, as he suggests. See Shequin v. Smith, 129 Vt. 578, 581 (1971) (recognizing that “[w]hile a legislature may regulate the procedure with respect to habeas corpus, and, to some extent, the purposes for which it may be used, the writ may not be abrogated or its efficiency curtailed by legislative action”). Instead, as set forth in § 7136, certain prerequisites must be satisfied before the petition will be considered. See Shequin, 129 Vt. at 581 (“The language of [13 V.S.A. §] 7136 clearly shows that if the petitioner wants to collaterally attack the proceedings below he must first apply for postconviction relief under [§] 7131.”). We held in Shequin “that the Vermont statutes providing a postconviction remedy of a prisoner in custody under sentence of a court are not in derogation of the rights of a convicted prisoner granted by the Vermont Constitution.” Id. at 582. We conclude that, as in Shequin, the habeas petition was properly dismissed because, at the time of the court’s decision, petitioner had not yet exhausted the PCR process. See id. at 578, 583 (affirming dismissal of petitioner’s habeas petition because he failed to exhaust the remedies available to him).

Turning to petitioner’s remaining arguments, we discern no harm from the fact that two trial judges apparently denied the State’s motion to transfer venue, which it proposed as an alternative if its motion to dismiss was denied. The rulings on this request do not in any way undermine the court’s decision with respect to the dismissal of petitioner’s habeas petition, as petitioner asserts. We do not reach petitioner’s arguments concerning the merits of his petition because we conclude that the petition was properly dismissed. Finally, petitioner did not have an absolute right to counsel in this proceeding. The record indicates that the Office of the Defender General declined to represent petitioner following a review of his case, as allowed under 13 V.S.A. § 5233(a)(3). We find no error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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William D. Cohen, Associate Justice